77-1203

No.



In the

# Supreme Court of the United States

ROY MARTIN MITCHELL,

*Petitioner,*

*vs.*

ELOISE BEARD, as Administratrix for the Estate of Jeff Beard,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*No.*

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ROY MARTIN MITCHELL,

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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### STATEMENT

Petitioner, Roy Martin Mitchell ("Mitchell"), respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit (Bauer, C.J.), entered on September 28, 1977, reversing a judgment of the United States District Court for the Northern District of Illinois, Eastern Division (Hoffman, J.) entered on May 27, 1976.

### OPINIONS BELOW AND JURISDICTION

The District Court's opinion granting petitioner-defendant's motion to dismiss respondent-plaintiff's 1871 Civil

Rights Act claim (42 U.S.C. §1983) and *Bivens*[1] claim, 75 C 3204, is unreported and is attached hereto as Appendix A. The opinion of the Court of Appeals reversing the District Court's decision on both claims is reported at 563 F.2d 331 (1977) and is attached hereto as Appendix B. The judgment below was entered on September 28, 1977.

This Petition is filed within the 60 day time limit set forth in the extension to file a petition for a writ of certiorari granted by Mr. Justice Stevens on December 16, 1977 pursuant to 28 U.S.C. §2101(c).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. §1291 and the District Court's jurisdiction was invoked pursuant to 28 U.S.C. §§1331, 1343.

## QUESTIONS PRESENTED

The fundamental and compelling question raised by the judgment below is whether the alleged violation of constitutional rights by a federal agent is of such paramount national concern that a uniform statute of limitations and right of survivorship should be created as a matter of federal common law. Analytically, the separate issues raised as questions are:

1. Whether the Court of Appeals erred in not establishing a uniform federal statute of limitations, as a matter of federal common law, to apply to claims in which money damages are sought for the violation of constitutional rights by a federal agent where: (a) under the Rules of Decision Act (28 U.S.C. §1652), the Court could have applied the statute of limitations provided in the Federal Tort Claims Act (28 U.S.C. §§2401, 2680(h)); and (b) under the 1871 Civil Rights Act (42 U.S.C. §1988), the Court could have applied the statute of limitations provided in the Federal Tort Claims Act.

[1] *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (hereinafter *Bivens*).



2. Whether the Court of Appeals erred in not adopting a uniform federal right of survival, as a matter of federal common law, to foster the application of the principles set forth in *Bivens* where: (a) under the Rules of Decision Act, the Court could have applied the survival statute contained in the 1871 Civil Rights Act (42 U.S.C. §1986); and (b) under the 1871 Civil Rights Act (42 U.S.C. §1988), the Court could have applied the survival statute.

3. Whether the Court of Appeals erroneously applied the Illinois five-year statute of limitations (Ill. Rev. Stat. ch. 83 §16) to a *Bivens* claim where: (a) Jeff Beard's beating and death occurred in Indiana; and (b) Illinois would treat the cause of action as one for damages to the person or for false imprisonment and apply its two-year statute of limitations (Ill. Rev. Stat. ch. 83 §15).

4. Whether the Court of Appeals, in determining that Illinois survival statute (Ill. Rev. Stat. ch. 3 §339) applied, incorrectly characterized a *Bivens* action as an action against officers for "misfeasance, malfeasance or nonfeasance".

## STATUTES INVOLVED

The statutes involved in this case are

28 U.S.C. §1652
28 U.S.C. §2401
28 U.S.C. §2680(h)
42 U.S.C. §1983
42 U.S.C. §1986
42 U.S.C. §1988
Ill. Rev. Stat. ch. 3 §339
Ill. Rev. Stat. ch. 83 §15
Ill. Rev. Stat. ch. 83 §16

and are fully set forth in Appendix C attached hereto.

## STATEMENT OF THE CASE

This case is brought against Mitchell, Stanley Robinson ("Robinson"), William O'Neal ("O'Neal") and Certain Officers of the Federal Bureau of Investigation whose true identities are unknown by Respondent, Eloise Beard, as Administrator for the Estate of Jeff Beard, the Deceased ("Beard's Estate"). The complaint, attached hereto as Appendix D, alleges *inter alia* that petitioner, Mitchell, and some or all of the other defendants, on May 17, 1972, while acting in their individual and official capacities assaulted Jeff Beard ("Beard") with a deadly weapon and killed him, thereby depriving him of his constitutional rights.[2]

Specifically, respondent contends that the Federal Bureau of Investigation ("FBI") was collecting intelligence on certain members of the Chicago Police Depart-

[2] Most of the facts contained in respondent's complaint are taken from *United States* v. *Robinson*, 503 F.2d 208 (7th Cir. 1974), which affirmed Robinson's conviction for depriving Beard of his civil rights under 18 U.S.C. §241.



ment, including defendant Robinson in connection with a series of unsolved murders of certain respectable citizens of Chicago's black community. Mitchell, who is an FBI agent along with and Certain Officers of the Federal Bureau of Investigation whose true identities are unknown to respondent ("Certain Officers of the FBI"), are alleged to have employed O'Neal to act as an informant and to provoke and participate in acts of violence being directed by Robinson in order to gather intelligence information.

Beard's Estate alleges that, while O'Neal was acting as an FBI informant, he conspired with Robinson to murder Beard, a small-time dope addict and drug pusher, on Chicago's West Side pursuant to a "contract" between Robinson and William Taylor, a West Side drug pusher.

It is alleged that on the night of May 17, 1972, Robinson, in the company of O'Neal, seized Beard on the pretext of arresting him in Chicago, Illinois and transported him to Indiana. While in the car, Robinson removed Beard's handcuffs and informed Beard that he was not under arrest, but rather Robinson wanted him to sell narcotics for him. Beard agreed to this proposition and began discussing the "street" prices of various drugs with Robinson.

At some time during this evening O'Neal unsuccessfully attempted to call Mitchell to advise him concerning these developments. Thereafter, O'Neal continued with Robinson and Beard to Indiana. When the parties reached a secluded area in Indiana, Robinson induced Beard to step out of the car to talk. When Beard got out of the car, Robinson shot at him, but missed. Robinson then chased Beard and when he caught him, shot, clubbed, and stabbed him to death. All these events occurred outside O'Neal's presence.

The next day O'Neal reported this incident to Mitchell. A search for Beard's body was promptly commenced. While this investigation was continuing, Robinson informed O'Neal of a contract to kill one "Jeepers". O'Neal reported this situation to Mitchell and Mitchell and O'Neal agreed that "Jeepers" should be taken into protective custody and that O'Neal would fake "Jeepers" murder.[3]

At an eight-week trial by jury before the Honorable Philip W. Tone, Robinson was found guilty beyond a reasonable doubt of these crimes and was sentenced to life imprisonment.

According to Beard's Estate, the failure of Mitchell and O'Neal to prevent Beard's murder by Robinson constitutes a "conspiracy" to deprive Beard of his constitutional rights. Thus, on September 25, 1975, more than three years after Beard's death, his Estate brought the instant suit seeking $250,000 in compensatory damages and $500,000 in punitive damages for the injuries Beard suffered as a result of this purported "conspiracy".

On Mitchell's motion, the District Court dismissed respondent's complaint, holding that a *Bivens* type action survived under Illinois law only insofar as it sought damages for the physical injuries that Beard suffered[4] and that the claims for physical injury were barred by Illinois' two-year statute of limitations (Ill. Rev. Stat. ch. 83 § 15).

Beard's Estate appealed this judgment to the Court of Appeals contending, *inter alia,* that the federal action for conspiracy to deprive Beard of his constitutional

[3] Mitchell was also sued by "Jeepers" for violating his constitutional rights by taking him into protective custody.

[4] All such injuries were sustained in Indiana.



rights survived his death either under Illinois law or federal common law and that the applicable statute of limitations is Illinois' five-year "catch-all" period of limitations (Ill. Rev. Stat. ch. 83 § 16).

The Court of Appeals for the Seventh Circuit reversed the decision of the District Court in its entirety. As to the issue of survivorship, the Court held, as a matter of federal law, that respondent's action survives under the Illinois law which allows an action to survive "against officers for misfeasance, malfeasance or nonfeasance". (Ill. Rev. Stat. ch. 3 § 339). In reversing the District Court's holding that the claims were barred by Illinois two-year statute of limitations, the Court of Appeals overruled its decision in *Jones* v. *Jones,* 410 F.2d 365 (7th Cir. 1969), *cert. den.* 396 U.S. 1013 (1970), which the District Court relied on for the proposition that a federal court was to apply the statute of limitations most analogous to the underlying state claim. The Court held, instead, that the appropriate period of limitations for a *Bivens* action is the Illinois five-year "catch-all" statute of limitations.

## REASONS FOR GRANTING THE WRIT

*Certiorari* should be granted not merely because the Court of Appeals erred on the application of Illinois law, but, more importantly, because the Seventh Circuit's judgment directly conflicts with the principles established by this Court in *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943); *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971); *O'Sullivan* v. *Felix,* 233 U.S. 318 (1914); and *Runyon* v. *McCrary,* 427 U.S. 160 (1975).* Unless the judgment of the Seventh Circuit is reversed, this Court will have condemned every federal agent to the vagaries of state law in determining when a constitutional claim may be raised and whether such an action survives despite the fact that the purported claim could be based on conduct which may have occurred anywhere in the world.

Moreover, the instant claim is based upon the *Robinson* criminal trial. That trial, which lasted eight weeks and consumed thousands of pages of testimony, was tried before Judge Tone, a respected member of the federal bench now serving on the Seventh Circuit Court of Appeals. The instant case seeks to rehash the issues raised in *Robinson* which resulted in the conviction of a cop-turned-killer. In light of the Seventh Circuit's manifest error in not barring respondent's stale claims, this Court should act decisively to prevent a protracted retrial of *Robinson* under the guise of an untimely filed civil suit.

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* The Court has granted certiorari in *Robertson* v. *Wegmann,* No. 77-178 (December 5, 1977) to determine whether federal common law should be applied to ascertain the survival of a civil rights action.



### 1. The Principles Established In Bivens Demand A Uniform Application Of Federal Law.

In *Bivens,* this Court created, as a matter of federal common law, a right to damages for an individual who suffers injury as a result of Fourth Amendment violations[5] committed by a federal agent acting under color of his authority. 403 U.S. at 389. In creating this right, the Court made it clear that constitutional violations committed by a federal agent are matters of national, not local, concern. 403 U.S. at 392, 394. Consequently, the remedy provided by *Bivens* was to be governed by uniform rules of federal law. Thus, this Court created a claim which is in no way dependent upon the laws of the State where the injury happened to occur. 403 U.S. at 409 (Harlan, J., concurring).

*Bivens* is consistent with well-established law that Fourth Amendment rights merit such paramount national concern that state laws will not be determinative either in ascertaining their violation or in fashioning a remedy. *Weeks* v. *United States,* 232 U.S. 314 (1914); *Byars* v. *United States,* 273 U.S. 28 (1927); *Gambino* v. *United States,* 275 U.S. 310 (1927); *Monroe* v. *Pape,* 365 U.S. 167 (1963). And where that federal concern is so great, federal courts must fashion uniform rules of federal law to govern the appropriate remedy. *Clearfield Trust Co.; Shaw* v. *Garrison,* 545 F.2d 980 (5th Cir. 1977) *cert. granted, sub nom Robertson* v. *Wegmann,* No. 77-178 (December 5, 1977); *c.f. Chevron Oil* v. *Huson,* 404 U.S. 97 (1971).

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[5] The instant Complaint also alleges violations of the Fifth, Eighth, Ninth, and Fourteenth Amendments.

In *Clearfield Trust Co.*, the Court noted:

> In our choice of the applicable federal rule we have occasionally selected state law [Citation omitted]. But reasons which make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.

318 U.S. at 367.

In the instant case, state law is likewise inappropriate for fashioning the rules under which a *Bivens* action is to be governed. Already, *Bivens* actions have been brought against the Attorney General (*Zweibon* v. *Mitchell,* 516 F.2d 594 (D.C. Cir. 1975)) the Secretary of the Treasury (*State Marine Lines, Inc.* v. *Schultz,* 498 F.2d 1146 (4th Cir. 1974)), customs agents and FBI agents (*Reagen* v. *Sullivan,* 557 F.2d 300 (2d Cir. 1977)), a United States Marshall (*Bennett* v. *Campbell,* 564 F.2d 329 (9th Cir. 1977)), and the District of Columbia Police, (*Dellums* v. *Powell,* 23 FR Serv 2d 1368 (D.C. Cir. 1977)). No doubt such suits would be maintainable against Internal Revenue agents, Occupational Health and Safety Act inspectors, or any federal officer with the power or authority to effect an investigation or arrest. The duties of such officers are national and, in some instances, international in scope. In the course of an investigation or arrest, federal officers will invariably cross state lines. The need for uniform federal rules is obvious.



However, the two Courts of Appeals which have considered the issue of the timeliness of a *Bivens* action have reached divergent results. In the instant case, the Seventh Circuit held that the appropriate period of limitations is Illinois' five-year "catch-all" statute. In *Reagan* v. *Sullivan,* the Second Circuit held that the appropriate period of limitations was either New York's three-year statute of limitations for an action to recover on a liability, penalty, or forfeiture *or* its six-year period of limitations for an action for which no statute was otherwise provided. 557 F.2d at 307.

Moreover, the Court below buttressed its reasoning that Illinois' five-year period applied because it held that five-year period applicable to § 1983 on that basis that:

> A contrary result could lead to the incongrous application of inconsistent limitations periods to different members of a single conspiracy, based solely on whether an officer alleged to have committed the constitutional violation was employed by the state or federal government.

563 F.2d at 338.

It is, at least, equally incongrous to have federal officials, whose duties often cross state lines, governed by a state limitation on liability for their actions, when that state's law can neither authorize their action or limit the extent to which their authority may be exercised. *Bivens,* 403 U.S. at 395.

But even if the Court below correctly based its opinion on the assumption that §1983 actions and *Bivens* actions should be governed by the same state statute of limitations, the result of this holding—if applied by all the Circuits—would result in a patchwork of varying periods of

limitation.[6] The instant case vividly demonstrates this. As noted earlier, because Beard was killed in Indiana, this same action for conspiracy could have been brought in the Northern District of Indiana. Following the reasoning of the Seventh Circuit, Indiana law on the right of survival and the period of limitations would apply. Hence, through *federal* forum-shopping, a plaintiff would be able to choose the best statute of limitations and survival statute. *See* 28 U.S.C. §1391(b). Obviously, this was not the intention of the Court when Justice Harlan noted:

> It seems to be entirely proper that these injuries be compensable according to uniform rules of federal law, especially in light of the very large element of federal law which must in any event control the scope of official defenses to liability [Citations omitted]. Certainly, there is very little to be gained from the standpoint of federalism by preserving different rules of liability for federal officers dependent on the State when the injury occurs.

403 U.S. at 409 (Harlan, J., concurring).

Given the fact that uniform rules of federal law must be applied to *Bivens* actions to prevent federal forum shopping for the best statute of limitations and right of survivorship, the question becomes on what basis should federal common law be established. As the Court noted in *Clearfield Trust,* 318 U.S. at 367, the fashioning of federal rules applicable to federal questions should be based upon reference to federal law. In this instance, the most convenient sources of reference for fashioning a uniform period of limitations and right of survival may be found

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[6] See Appendix E attached hereto.



in the Federal Tort Claims Act (28 U.S.C. §§ 2401, 2680(h)) and the 1871 Civil Rights Act (42 U.S.C. § 1986).

As the latest statement of Congressional policy, the Federal Tort Claim Act provides that the United States will be liable in tort for Fourth Amendment violations committed by federal investigative or law enforcement officers provided that an action for damages is brought within two years. Although this Act applies to violations which occur after its enactment, it provides a sufficient basis for applying the two-year statute to all *Bivens* claims for several reasons:

(a) it states a uniform federal statute of limitations to be applied to *Bivens* actions wherever they arise;

(b) if it is not adopted, then following the reasoning of the court below, a federal agent would be liable in Illinois for five years, while the government whose orders he was ostensibly carrying out would be liable for only two years; and

(c) the government would be liable in tort in accordance with the law of the state in which the injury occurred including its choice-of-law rules (*Richards* v. *United States,* 369 U.S. 1 (1962)) while the agent would be liable in accordance with the law of the forum state (*see, e.g., Runyon* v. *McCrary,* 427 U.S. 160 (1975)).

Likewise, Congress has spoken to the issue of whether a claim for violation of constitutional rights may survive the death of the victim. The 1871 Civil Rights Act provides:

> If the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have action therefore, and may recover not exceeding $5,000.00 damages therein for the

> benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

§ 42 U.S.C. 1986.

Although this section expressly applies only to § 1985 of the Civil Rights Act, this Court, in *O'Sullivan* v. *Felix*, 233 U.S. 318, 323, 324 (1914), indicated that, wherever death results as a consequence of a violation of constitutional rights, this statute would apply. This interpretation is consistent with the obvious intent of Congress, for at the time the Ku Klux Klan Act was passed, few, if any, states provided for the survival of a cause of action or for wrongful death actions. Thus, Congress decided that a claim for violation of constitutional rights where death is the result should survive only to the extent that such damages do not exceed $5,000 and that it survives for only one year.

Under the Rule of Decision Act and *Clearfield Trust Co.*, this Court should adopt these laws as federal common law because they are the latest statement of the legislature as to the applicable statute of limitations and survival statute for causes of action for violaton of constitutional rights.

**2. The Basis Upon Which The Court Concluded That The Illinois "Catch All" Statute of Limitations Governed Bivens Actions Is In Conflict With The Holdings Of This Court.**

In determining that Illinois' "catch-all" statute of limitations applied to *Bivens* actions, the Court below has de-



parted not only from the holdings of this Court and the other Circuits, but from its own decisions as well. Disregarding the mandate of the Court in *Monroe* v. *Pape*, 365 U.S. at 187, that constitutional violations "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," the lower Court held that a *Bivens* claim could not be equated with a state tort claim. 563 F.2d at 338. Therefore, reasoned the Court below, the only statute of limitations which would be applicable is the "catch-all" statute of limitations.

This reasoning ignores all relevant holdings of this Court since *O'Sullivan* v. *Felix*. In *O'Sullivan*, the Court held that an action for damages brought under the 1871 Civil Rights Act is governed by the most appropriate state period of limitations. In so holding, the Court necessarily recognized the duty of the federal courts to look to the underlying claim to determine the most applicable statute of limitations. *Monroe* v. *Pape, Johnson* v. *Railway Express Company*, 421 U.S. 454 (1974), and *Runyon* v. *McCrary* unequivocally support this fundamental proposition.

In *Runyon* v. *McCrary*, this Court affirmed the application of Virginia's general tort statute of limitations to a claim seeking to vindicate constitution rights and noted:

> And whether the damages claim of the Gonzaleses be properly characterized as involving "injured feelings" . . . or the vindication of constitutional rights, . . . there is no dispute that the damages was to their persons . . .

427 U.S. at 182.

Likewise, the instant case is brought to recover damages for injury to Beard's person suffered as a result of his

arrest.[7] Hence, assuming that the lower court was bound to follow the analogous state period of limitations rather than to establish a federal statute of limitations, the Illinois law most appropriate to this claim is the two-year statute of limitations governing injuries to the person and false imprisonment (Ill. Rev. Stat. Ch. 83 § 15).

Although this Court will not generally reject the judgment of a Court of Appeals concerning which state statute of limitations is most appropriate, there are several reasons why the Court should review the decision below:

(a) the Court's decision is in conflict with its holding in *Jones* v. *Jones*;
(b) the District Court and the Court of Appeals have disagreed as to the interpretation of state law;
(c) the Circuits are split as to whether to apply the "catch-all", statutory, or the "underlying state action" statute of limitations should apply to suits seeking damages for constitutional violations.

In *Jones* v. *Jones,* the plaintiff brought suit under § 1983 alleging that his wife, her family, her lawyers, and certain judges of the Illinois courts had combined to unconstitutionally deprive him of his constitutional rights and that as a result thereof, he was ordered to pay child support, and committed to jail for contempt because of his refusal to make payments. The Seventh Circuit noted that because neither federal common law nor the federal Civil Rights statute contained a statute of limitations, "the applicable statutes of the forum state which governs the closest analogous state action will control", 410 F.2d at 366, 367, and held:

[7] It is doubtful whether this claim seeks damages for the beating and death of Beard because these were not caused by one acting under color of law. Moreover, such a claim would be governed by Indiana law.



> In considering the substance of the alleged injury and not merely the name given to it by the parties, we hold that the statute of limitations in Chapter 83, Illinois Revised Statutes § 15 (§ 14 of the Limitations Act) applies.

In *Baker* v. *F&F Investment Co.,* 489 F.2d 829, 837 (7th Cir. 1973) (Baker II) the Court followed the reasoning set forth in *Jones* v. *Jones* when it explained the import of its decision in *Baker* v. *F&F Investment Co.,* 420 F.2d 1191 (7th Cir. 1970), *cert. denied,* 400 U.S. 821 (1970) (Baker I) as follows:

> *Baker I* held only that if no specific facts of a civil rights suit bring it within some other statute of limitations, the Ill. Rev. Stats. 1971, Ch. 83 § 16 applies. But all the relevant elements of each lawsuit must be considered before characterizing it for statute of limitations purposes.

It should be noted, moreover, that the *Baker II* defendants were *federal* officer and agencies.

In the instant case, which includes federal officers as defendants, however, the Court below has decided, contrary to the holdings of *Monroe* v. *Pape, O'Sullivan* v. *Felix,* and its own decisions, that it will no longer consider the relevant elements of a particular lawsuit to determine the applicable statute of limitations. Such a radical departure from the established law of this Court and the Circuit demands immediate review.

In reversing the District Court's opinion, the Court of Appeals has not only overruled its holding applicable to Illinois law, *Jones* v. *Jones,* and *Baker II*, but has also overturned the established law applied to cases

brought in Indiana and Wisconsin involving constitutional claims. *See, e.g., Hill* v. *Trustees of Indiana University,* 537 F.2d 248 (7th Cir. 1976) (Kunzig, J. concurring specifically); *Ka-Haar Inc.* v. *Huck,* 345 F.Supp. 54 (E.D. Wis. 1972); *Margoles* v. *Ross,* 67 F.R.D. 666 (W.D. Wis. 1975).

There can be little doubt that, in overturning 29 years of well-founded decisional law (*see, e.g., Gordon* v. *Garrison,* 77 F.Supp. 477 (E.D. Ill. 1948)), the effect of the decision below, will be the institution of heretofore stale lawsuits.

In addition, the decision of the Court below is based upon a fundamentally illogical reasoning process. In holding that the claim of Beard's Estate survived as a matter of federal law, the Court looked to the underlying state claim and reasoned that the claim survived as an action for misfeasance, malfeasance and nonfeasance. 563 F.2d at 333. In holding that the "catch-all" statute of limitations applied, however, the Court stated that "*Bivens* claim for deprivation of constitutioned rights cannot be equated with state tort claims." 563 F.2d at 338.

Thus, district courts within the jurisdiction of the Seventh Circuit are now placed in the analmous position of looking to the underlying state cause of action to determine if a *Bivens* claim survives while, at the same time, in applying a statute of limitations, holding that *Bivens* actions are analagous to *no* state cause of action. Such inherently contradictory reasoning requires immediate review by this Court.

In addition to the conflict with the holdings of this Court and the inherent inconsistency contained in the decision of the Court of Appeals, there is a split among the circuits as to whether the "catch-all" or the underlying state action "period of limitations should apply to suits alleging the violation of constitutional rights. Thus, the Tenth Circuit, in *Crosswhite* v. *Brown,* 424 F.2d 495, n.2 (10th Cir. 1970) applied Oklahoma's two-year general statute of limitations for an action for injury to the rights of another not arising from one contract and not otherwise enumerated.



In keeping with *O'Sullivan* v. *Felix,* the Third, Fourth, Fifth, Sixth and Eighth Circuits apply the statutes of limitations most applicable to the underlying state cause of action. *Howell* v. *Cataldi,* 464 F.2d 272 (3d Cir. 1972); *Almond* v. *Kent,* 459 F.2d 200 (4th Cir. 1972); *Shaw* v. *McCorkle,* 537 F.2d 1289 (5th Cir. 1976); *Madison* v. *Wood,* 410 F.2d 564 (6th Cir. 1969); *Peterson* v. *Fink,* 515 F.2d 815 (8th Cir. 1975). The Second Circuit, however, is not clear as to whether the general statute of limitations on this statute most analgous to the underling claim. *Reagan* v. *Sullivan.*

While, from the standpoint of federalism, there might be something to be gained by applying the various state statutes of limitations to state officers in a suit brought under § 1983, there is no reason for such a conflict to exist in determining what statute of limitations should apply to federal officers. 403 U.S. at 409 (Harlan, J., concurring). Indeed, as noted earlier, such a divergency can only result in federal forum shopping.

## CONCLUSION

As this Court is well aware, much litigation and literature—some responsible, some otherwise—have been reported since *Bivens* was decided in 1971. In the instant matter, this Court is confronted with a classic case calling for prompt resolution. A reknowned FBI agent, who was instrumental in bringing the killers of three civil rights workers in Mississippi to justice, applied this same dedication to bring the suspected killer of six responsible black citizens of Chicago before the bar of justice. In the course of gathering information on Robinson, the cop-turned-killer, Robinson seized a drug addict and pusher in the presence of O'Neal, Mitchell's contact.

More than three years later, Beard's Estate sued, claiming, under *Bivens,* that the man largely responsible for convicting Robinson for the murder of Beard somehow conspired with that murderer to deprive Beard of his constitutional rights. The District Court applied established law and dismissed this untimely and unwarranted claim. The Seventh Circuit created new law and reversed. In so doing, the principles established in *Bivens* have become hazy. Thus Mitchell has been consigned by that Court to defend his conduct in a new uncertain and murky area of the law.

Petitioner Mitchell respectfully submits that this Court should grant his petition for writ of certiorari so that it



may establish uniform federal law to be applied to such actions.

Respectfully submitted,

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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

ELOISE BEARD, as Administratrix of the Estate of JEFF BEARD, the Deceased,

Plaintiff,

vs.

STANLEY B. ROBINSON, WILLIAM M. O'NEAL, RAY MARTIN MITCHELL, and Certain Officers of the Federal Bureau of Investigation, whose true identities are unknown to the plaintiff,

Defendants.

No. 75 C 3204

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Thursday, May 27, 1976, at the hour of 10:00 o'clock a.m.

Appearances:

Messrs. Sonnenschein, Carlin, Nath and Rosenthal
69 W. Washington Street
Chicago, Illinois 60602
By: Mr. Peter M. Weil,
appeared on behalf of the plaintiff;

Hon. Samuel K. Skinner
United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
By: Mr. Arnold Kanter
Ms. A. M. Kwoka,
Assistant U. S. Attorneys,
appeared on behalf of some of the defendants;

Messrs. Devoe, Shadur and Krupp
208 S. LaSalle Street
Chicago, Illinois 60604
By: Mr. Ronald Barliant,
appeared on behalf of the defendant,
Stanley B. Robinson.

The Clerk: 75 C 3204, Eloise Beard v. Stanley B. Robinson, ruling on defendants Robinson and Mitchell to dismiss the complaint.

The Court: Thank you for coming in. I have for ruling here the motions of the defendants Robinson and Mitchell to dismiss the complaint.

This is an action under 42 U.S.C. Sections 1983 and 1985 by Eloise Beard in her capacity as administratrix of the estate of Jeff Beard to redress the alleged depravation of the decedent's constitutional rights. The plaintiff is seeking compensatory and puntative damages and invokes the jurisdiction of this Court pursuant to 28 U.S.C. Sections 1331 and 1343.

Named as defendants are: Stanley B. Robinson, a Chicago Police Officer; Roy Martin Mitchell, a Special Agent of the Federal Bureau of Investigation; and William O'Neal, an alleged paid informant for the FBI.

According to the allegations in the complaint, the depravation of the constitutional rights of plaintiff's decedent occurred during the course of an FBI investigation that was intended to expose suspected corruption among members of the Chicago Police Department, including defendant Robinson.

The plaintiff contends that as part of that investigation, the defendant Mitchell employed the defendant O'Neal, a paid informer, to provoke and participate in criminal acts being committed by Robinson and others. One such incident is alleged to have occurred on or about May 17, 1972, when defendants Robinson and O'Neal, on the pretext of making a lawful arrest, abducted Jeff Beard and drove him from Chicago to Indiana where he was



clubbed and shot to death by Robinson. Plaintiff maintains that the acts which resulted in the death of Jeff Beard constituted a conspiracy to interfere with, as well as an actual depravation of, Jeff Beard's constitutional rights under the Fourth, Fifth, Eighth, Nineth and Fourteenth Amendments.

The action is now before the Court on the motion of the defendants Robinson and Mitchell to dismiss the complaint for failure to state a claim upon which relief can be granted. Among the grounds asserted in support of the motions are that the plaintiff's claim has in part abated, and to the extent that it has not abated, is time barred.

In determining whether the plaintiff's claim has abated, it has been held that "in a federal civil right's action where the person who has been deprived of his rights has died that action survives for the benefit of the estate if the applicable state law creates such a survival action." Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974).

In pertinent part, the Illinois Survival Statute, Section 3, Illinois Revised Statutes, Section 339 provides that that "in addition to the actions which survive by the common law, the following also survive: actions to recover damages for an injury to the person, except slander and libel; and actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies."

Illinois law does not, however, provide for the survival of actions for either conspiracy or the violation of a person's civil rights. Moreover, since police officers are not "officers" within the meaning of the statute, Kent v. Muscarello, 9 Ill.App.3d 738 (2nd Dist. 1973), the plaintiff's claim survives only to the extent that the action seeks to recover damages for physical injuries alleged to have been suffered by Jeff Beard, Mattyasovsky v. West Town Bus Co., 21 Ill.App.3d 46 (2nd Dist. 1974).

But such an action, although within the scope of the Survival Statute, is nevertheless time barred under the

applicable Statute of Limitation; whereas, here neither Federal Common Law nor the Civil Rights Act establish a time limit within which an action must be commenced "the applicable statute of the forum state which governs the closest analogous state action will controll." Jones v. Jones, 410 F.2d 365, 366 (7th Cir. 1969). Thus, "considering the substance of the alleged injury, and not merely the name given to it by the parties" Jones v. Jones, to which I have previously alluded, at Page 367.

It is clear that the case at bar is governed by Chapter 83, Section 15 of the Illinois Revised Statutes, which provides that "action for damages for an injury to the person shall be commenced within two years next after the cause of action accrued." The complaint in the present action having been filed on September 25, 1975, more than two years after the incident in question is alleged to have occurred is therefore untimely.

Furthermore, although plaintiff does not specifically seek damages for the wrongful death of Jeff Beard, such an action would also be untimely in view of the two-year limitation period contained in Chapter 70, Section 2 of the Illinois Revised Statutes. Evain v. Conlisk, 364 F. Supp. 1188 (N.D. Ill. 1973).

Accordingly, the motions of the defendants Robinson and Mitchell to dismiss the complaint, Mr. Clerk, will be allowed.

As to the remaining defendant William O'Neal, the Court file contains the letter from one, Mr. Peter Weil, to the Clerk of this Court dated September 24, 1975, in which he stated that because of the lack of information regarding O'Neal's address summons was not being issued at that time. Since there is nothing in the Court file or on the docket sheet which indicates that a summons was subsequently issued as to the defendant O'Neal, the claim will be dismissed sua sponte as to the defendant William O'Neal for want of prosecution without prejudice.

Mr. Kanter: Thank you, Judge.

Mr. Barliant: Thank you, your Honor.



IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 75 C 3204) • •

CERTIFICATE

I, Joan M. Unzicker, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings had in the above-entitled cause before the Hon. Julius J. Hoffman, one of the Judges of said Court, in his courtroom at Chicago, Illinois, on May 27, 1976.

/s/ Joan M. Unzicker
Official Court Reporter
United States District Court
Northern District of Illinois

## APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1708

ELOISE BEARD, as Administratrix for the Estate of Jeff Beard, the Deceased,

*Plaintiff-Appellant,*

*v.*

STANLEY B. ROBINSON, ROY MARTIN MITCHELL, and Certain Officers of the Federal Bureau of Investigation, whose true identities are unknown to the plaintiff,

*Defendants-Appellees.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 75 C 3204—JULIUS J. HOFFMAN, *Judge.*

ARGUED FEBRUARY 8, 1977—DECIDED SEPTEMBER 28, 1977

Before BAUER, WOOD, *Circuit Judges,* and SHARP, *District Judge.*•

BAUER, *Circuit Judge.* In this appeal we must determine whether damage claims brought against a state officer under the Civil Rights Acts, 42 U.S.C. § 1981, *et seq.,* and against federal officers under the Fourth Amendment survive the death of the injured party, and whether the claims are time-barred. The district court held that some of the claims did not survive the death of the injured party and that the other claims were time-barred. We reverse.

• The Hon. Allen Sharp, United States District Court for the Northern District of Indiana, is sitting by designation.



Plaintiff Eloise Beard brought this action in the district court as administratrix of the Estate of Jeff Beard, who allegedly was murdered by the defendants. Plaintiff sued Stanley Robinson, a Chicago policeman at the time of the events underlying the suit, under the Civil Rights Acts, 42 U.S.C. § 1981, *et seq.,* and the other defendants, Federal Bureau of Investigation personnel, under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). The complaint alleges that the defendants conspired to deprive, and actually deprived, Jeff Beard of his constitutional rights in the course of an FBI investigation into corruption among members of the Chicago Police Department. As part of the investigation, the FBI purportedly employed defendant William O'Neal to covertly gather information about the Department by engaging in criminal acts with Robinson and others. Defendant Roy Mitchell served as O'Neal's FBI contact. With the assistance of Mitchell and other unknown FBI agents, Robinson and O'Neal allegedly planned and committed Jeff Beard's murder on or about May 17, 1972, when they seized Beard in Chicago under the pretext that they had a warrant for his arrest; searched and handcuffed him, and drove him to Indiana, where Robinson clubbed and shot him to death. No warrant for Beard's arrest ever existed. The complaint, filed on September 25, 1972, seeks both compensatory and punitive damages from the defendants for violating Beard's rights under the Fourth, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution.

Upon motion of the defendants, the district court dismissed the complaint. The court reasoned that our decision in *Spence* v. *Staras,* 507 F.2d 554, 557 (7th Cir. 1974) mandates that federal civil rights actions survive for the benefit of an injured party's estate only to the extent that the applicable state law permits such claims to survive. Looking to the Illinois Survival Act, Ill. Rev. Stat. ch.

3, § 339[1], the court concluded that the instant claims survived only insofar as they sought damages for the physical injuries Beard suffered. Relying on *Jones* v. *Jones*, 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970), the court then dismissed the action altogether because the physical injury claims were barred by Illinois's two-year statute of limitations. Ill. Rev. Stat. ch. 83, § 15.

## II.

*Survival*

We turn first to the question of whether the claims alleged survive Beard's death. Plaintiff presents several theories for the survival of her action. She argues that the action as a whole survives (1) under the Illinois Survival Act, both as an action to recover damages for "injur[ies] to the person" and as an action "against officers for misfeasance, malfeasance, or nonfeasance"; (2) under Illinois common law; and (3) under federal common law. We hold, as a matter of federal law, that under Illinois law the action survives "against officers for misfeasance, malfeasance or nonfeasance" and thus need not consider plaintiff's other arguments.

Neither the Civil Rights Acts nor the Supreme Court's decision in *Bivens* speaks to the abatement or survival of actions brought thereunder. Faced with the absence of a governing federal rule of decision, most courts that have

[1] Ill. Rev. Stat. ch. 3, § 339 provides:

"In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander or libel), actions to recover damages for an injury to real or personal property, actions against officiers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 14 of Article VI of 'An Act relating to alcoholic liquors,' approved January 31, 1934 as amended."



considered the question of the survival of federal civil rights claims have looked to state law, either on the authority of 42 U.S.C. § 1988[2] or simply because reference to state law obviated the need to fashion an independent federal common law rule. E.g., *Spence* v. *Staras*, 507 F.2d 554, 557 (7th Cir. 1975); *Hall* v. *Wooten*, 506 F.2d 564 (6th Cir. 1974): *Brazier* v. *Cherry*, 293 F.2d 401 (5th Cir.) *cert. denied*, 368 U.S. 921 (1961); *Pritchard* v. *Smith*, 289 F.2d 153 (8th Cir. 1961). At least one court has found it necessary to fashion an independent federal common law rule when state law, which would have defeated the survival of the federal claim, was deemed inconsistent with the strong federal policy of insuring the survival of federal remedies for violation of federal civil rights. *Shaw* v. *Garrison*, 545 F.2d 980 (5th Cir. 1977).

Because we believe the borrowing of state law in the circumstances of this case is completely consistent with the federal policies underlying *Bivens* and the Civil Rights Acts, we have no occasion to fashion an independent

[2] 42 U.S.C. § 1988 provides in pertinent part:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

federal common law rule here. With respect to plaintiff's civil rights claims, 42 U.S.C. § 1988 authorizes our reference to state law insofar as it is "not inconsistent with the Constitution and laws of the United States." With respect to plaintiff's *Bivens* claim, the adoption of state law likewise seems warranted since it is consistent with the federal policies underlying *Bivens*.[3]

The applicable Illinois law that we adopt as the governing federal rule is found in the Illinois Survival Act, Ill. Rev. Stat. ch. 3, § 339, which provides:

> "In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 14 of Article VI of of 'An Act relating to alcoholic liquors', approved January 31, 1934 as amended."

In view of the Illinois Supreme Court's declaration that this act is "remedial in its nature and is to be liberally construed," *McDaniel* v. *Bullard*, 34 Ill. 2d 487, 491, 216 N.E.2d 140, 143 (1966), we believe the district court erred in relying on *Kent* v. *Muscarello*, 9 Ill. App. 3d 738, 293 N.E.2d 6 (2d Dist. 1973), for the proposition that this action does not survive as an action "against officers for

[3] State survival statutes commonly have been adopted as a matter of federal law for application to other federal causes of action for which there is no federal rule regarding abatement or survival. E.g., *Cox* v. *Roth*, 348 U.S. 207 (1955) (Jones Act); *Just* v. *Chambers*, 312 U.S. 383 (1941) (admiralty tort); *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342 (1937) (Merchant Marine Act). See also the other cases cited in *Brazier* v. *Cherry*, *supra*, and *Pritchard* v. *Smith*, *supra*.



misfeasance, malfeasance, or nonfeasance of themselves or their deputies." To be sure, *Kent* held that a malicious prosecution action against two Barrington, Illinois policemen did not survive the death of the injured party. *Kent's* holding that the policemen were not "officers" for the purposes of the Illinois Survival Act, however, was based on the fact that the policemen were not deemed "officers" at common law, by statute or by municipal ordinance. For the latter proposition, *Kent* relied on *Krawiec* v. *Industrial Commission*, 372 Ill. 560, 564, 25 N.E.2d 27 (1939), which held that policemen of the City of Chicago Heights, Illinois were not made officers of the City by municipal ordinance and thus were entitled to recover under the Illinois Workmen's Compensation Act. However, *Krawiec* itself distinguished *City of Chicago* v. *Industrial Commission*, 291 Ill. 23, 125 N.E. 705 (1920), which held that City of Chicago policemen were made officers by city ordinances and thus were not entitled to workmen's compensation benefits. Since *City of Chicago* has not been overruled by the Illinois Supreme Court and thus still stands for the proposition that Chicago policemen are officers of the City, we feel compelled to follow *City of Chicago* and hold that Chicago policemen are also "officers" for purposes of the Illinois Survival Act. Accordingly, we hold that the instant action brought against defendant Robinson, sued in his capacity as a Chicago policeman, survives Beard's death. See *Holmes* v. *Silver Cross Hospital of Joliet, Illinois*, 340 F. Supp. 125, 129 (N.D. Ill. 1972).

Moreover, inasmuch as FBI agents are deemed federal officers under federal law, see *Lowenstein* v. *Rooney*, 401 F. Supp. 952, 960-62 (E.D.N.Y. 1975), we believe that plaintiff's *Bivens* action also can be characterized as an action "against officers" within the meaning of the Illinois Survival Act. Accordingly, adopting as federal law the Illinois Survival Act, we hold that plaintiff's *Bivens* action against the federal defendants survives as well.

## III.

*Statute of Limitations*

Neither the Civil Rights Acts nor *Bivens* fixes a time limit within which suits brought thereunder must be commenced. As to plaintiff's civil rights claims, however, precedents establish that the applicable limitations period is that which a court of the State where the federal court sits would apply had the action been brought there. *O'Sullivan* v. *Felix,* 233 U.S. 318 (1914); *Duncan* v. *Nelson,* 466 F.2d 939, 941 (7th Cir.), *cert. denied,* 409 U.S. 894 (1972); see 42 U.S.C. § 1988. Hence, we look to Illinois law to determine the statute of limitations applicable to defendant Robinson.

As to plaintiff's *Bivens* claims, the parties to this action agree that the applicable limitations period is that which would govern an analogous action brought in a court of the forum state. *Reagan* v. *Sullivan,* 417 F. Supp. 399 (E.D.N.Y. 1976); *Lombard* v. *Board of Education of the City of New York,* 407 F. Supp. 1166, 1171 (E.D.N.Y. 1976), *rev'd on other grounds,* 502 F.2d 631 (2d Cir. 1974); *Ervin* v. *Lanier,* 404 F. Supp. 15, 20 (E.D.N.Y. 1975); see *Fine* v. *City of New York,* 529 F.2d 70, 76-77 (2d Cir. 1975). Accordingly, we will also look to Illinois law to determine the statute of limitations applicable to the federal defendants. We note, however, that our borrowing of state limtiations periods to determine the timeliness of both these claims is conditioned on the state limitations period being consistent with the policies underlying the federal rights of action. *Occidental Life Insurance Co.* v. *EEOC,* 45 U.S.L.W. 4752, 4755 (June 20, 1977); see 42 U.S.C. § 1988.

Although the parties agree that we should look to Ilinois law to determine the applicable statute of limitations, they disagree as to which Illinois statute of limitations should be applied. The plaintiff, relying on *Wakat* v. *Harlib,* 253 F.2d 59 (7th Cir. 1958), argues that Illinois's



five-year statute of limitations governing "all civil actions not otherwise provided for" by the Illinois Limitations Act, Ill. Rev. Stat. ch. 83, § 16,[4] governs both her claims. Plaintiff notes that under Illinois law, this limitations period applies to causes of action created by statute, *Blakeslee's Storage Warehouses* v. *City of Chicago,* 369 Ill. 480, 17 N.E.2d 1, 4 (1938); *Parmalee* v. *Price,* 208 Ill. 544, 70 N.E. 725 (1904); *Gibralter Ins. Co.* v. *Varkalis,* 115 Ill. App. 2d 130, 253 N.E.2d 605, 608-09 (1969), *aff'd,* 46 Ill. 2d 481, 263 N.E.2d 823 (1970); *Lyons* v. *Morgan County,* 313 Ill. App. 296, 40 N.E.2d 103 (1942), and that the action created by the Civil Rights Acts is such a cause of action. The same statute of limitations should govern the claims brought against the federal officers, says plaintiff, because the *Bivens* action is analogous to actions brought under the Civil Rights Acts, and it would be incongruous to apply a different limitations period to such actions merely because federal rather than state officers are being sued.

The defendants, relying on *Jones* v. *Jones,* 410 F.2d 365 (7th Cir. 1969), *cert. denied,* 396 U.S. 1013 (1970), argue that Illinois's two-year statute of limitations for

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[4] Ill. Rev. Stat. ch. 83, § 16 provides:

"Except as provided in Section 2-725 of the 'Uniform Commercial Code', approved July 31, 1961, as amended, and Section 11-3 of 'the Illinois Public Aid Code', approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued."

"injur[ies] to the person, false imprisonment, and abduction," Ill. Rev. Stat. ch. 83, § 15,[5] should be applied to plaintiff's civil rights claims because the actions governed by this statute are the substantive offenses that most closely resemble the misconduct in which the defendants here are alleged to have engaged. With respect to the *Bivens* action, defendants contend that the two-year limitations period should also govern because (1) *Bivens* actions are not based upon a statutory liability like civil rights actions, but are actions to redress "constitutional torts," and (2) the two-year statute of limitations governing the instant civil rights claims should be applied to the analogous *Bivens* claims as well.

We turn first to the question of which state statute of limitations period applies to plaintiff's statutory civil rights claim and confess at the outset that the state of the law in this Circuit regarding the limitations period applicable to claims brought under federal civil rights acts is less than lucid.

In *Wakat* v. *Harlib, supra,* the plaintiff sued several Chicago police officers who arrested him without a warrant or probable cause and detained him six days without charging him with a crime, without allowing him to see an attorney, and without allowing him to appear before a judge for a bail hearing. The officers also coerced him into signing a confession later used in court to convict him, searched his home and workplace and seized his personal property without a warrant or probable cause. The plaintiff's action was based on 42 U.S.C. §§ 1983 and 1985, and we held his claims were

[5] Ill. Rev. Stat. ch. 83, § 15 provides:

"Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years next after the cause of action accrued."



governed by Illinois's five-year statute of limitations covering causes of action created by statute. Subsequently, *Wakat's* holding was followed or cited without disapproval in at least the following cases: *Inada* v. *Sullivan,* 523 F.2d 485 (7th Cir. 1975); *Duncan* v. *Nelson,* 466 F.2d 939, 941 (7th Cir.), *cert. denied,* 409 U.S. 894 (1972); *Rinehart* v. *Locke,* 454 F.2d 313, 315 (7th Cir. 1971); *Weber* v. *Consumers Digest, Inc.,* 440 F.2d 729, 731 (7th Cir. 1971); *Baker* v. *F. & F. Investment,* 420 F.2d 1191, 1197-98 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970); *Amen* v. *Crimmens,* 379 F.Supp. 777, 779 (N.D. Ill. 1974); *Holmes* v. *Silver Cross Hospital of Joliet, Illinois,* 340 F. Supp. 125, 128 (N.D. Ill. 1972).

In *Jones* v. *Jones, supra,* however, we took a different tack toward the problem of ascertaining the applicable limitations period for federal civil rights claims. The *Jones* plaintiff had brought suit under 42 U.S.C. § 1983 against his ex-wife, members of her family, her lawyers, and judges of the Illinois Circuit and Appellate Courts for combining to deprive him of his constitutional rights in a series of court actions involving his ex-wife's claims for alimony and child support that ultimately resulted in his serving a jail term. After determining that the judges were immune from suit and that the lawyers could not be sued under the Civil Rights Acts because they were not acting under color of state law, we looked to "the substance of the alleged injury" to determine the applicable limitations period and held that the two-year statute of limitations contained in Ill. Rev. Stat. ch. 83, § 15 governed the action against the remaining defendants because the damages sought resulted from an injury to the plaintiff's person, false imprisonment, and malicious prosecution. We attempted to distinguish *Wakat* on the ground that the earlier case involved a conspiracy claim brought under 42 U.S.C. § 1985, rather than a Section 1983 claim. Subsequently, *Jones* was cited with approval in *Baker* v. *F. & F. Investment Co.,* 489 F.2d 829, 837 (7th Cir. 1973), and followed by at

least three district courts in the Circuit. *Cage* v. *Bitoy*, 406 F. Supp. 1220 (N.D. Ill. 1976); *Klein* v. *Springborn*, 327 F. Supp. 1289, 1290 (N.D. Ill. 1971); *Skrapits* v. *Skala*, 314 F. Supp. 510 (N.D. Ill. 1970).

Upon reflection, it seems to us that *Wakat* and *Jones* cannot stand together, for underlying the inconsistent results reached therein[6] are two inconsistent approaches to determining the applicable statute of limitations. The *Wakat* approach treats all claims founded on the Civil Rights Acts as governed by the five-year Illinois statute of limitations applicable to all statutory causes of action that do not contain their own limitations periods. *Jones*, on the other hand, looks beyond the fact that a statutory cause of action has been alleged and seeks to characterize the facts underlying plaintiff's claim in terms of traditional common law torts for purposes of determining the applicable state statute of limitations. Faced with these two conflicting approaches that have generated inconsistent results within the Circuit, we now believe it is necessary to overrule Jones and adopt the *Wakat* rule as the law of the Circuit for the following reasons.*

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[6] Apart from the *Jones* Court's failure to recognize that *Wakat* was based on 42 U.S.C. § 1983, as well as Section 1985 and thus could not be distinguished merely on that ground, *Wakat's* reasoning could have been applied without strain to the *Jones* facts; the action brought by Jones under 42 U.S.C. § 1983 could just as well have been characterized as a statutory right of action governed by Illinois's five-year statute of limitations. Likewise, the damages *Wakat* sought arose from injuries that could have been characterized as injuries to his person, false imprisonment, and abduction, all mentioned in Ill. Rev. Stat. ch. 83, § 15.

* In view of our overruling *Jones*, the portions of this opinion relative to our holding have been circulated among all the judges of this Court in regular active service. No judge favored a rehearing en banc with respect to that holding. Judge Tone did not participate in the Court's action.



We believe our choice of the *Wakat* rule is compelled by the fundamental differences between a civil rights action and a common law tort. The Civil Rights Acts do not create "a body of general federal tort law." *Paul* v. *Davis*, 424 U.S. 693, 701 (1976). Rather, they

> "creat[e] rights and impos[e] obligations different from any which would exist at common law in the absence of statute. A given state of facts may of course give rise to a cause of action in common-law tort as well as to a cause of action under Section 1983, but the elements of the two are not the same. The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in common-law tort; both might be present without creating common-law tort liability." *Smith* v. *Cremins*, 308 F.2d 187, 190 (9th Cir. 1962) (footnote and citations omitted).

As Justice Harlan suggested with regard to the Civil Rights Acts,

> "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe* v. *Pape*, 365 U.S. 167, 194 (1961) (concurring opinion).

By following the *Wakat* approach of applying a uniform statute of limitations, we avoid the often strained process of characterizing civil rights claims as common law torts, and the

> "[i]nconsistency and confusion [that] would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several different periods of limitation applicable to each state-created

right were applied to the single federal cause of action." *Smith* v. *Cremins, supra* at 190.

Moreover, we note that the *Wakat* approach of looking to a general state statute of limitations prevails in most of our sister circuits, while the *Jones* approach of looking to the underlying tort to determine the applicable state statute of limitations has been followed consistently only by the Third Circuit.[7]

[7] E.g., *Ammlung* v. *City of Chester*, 494 F.2d 811, 814 (3d Cir. 1974); *Howell* v. *Cataldi*, 464 F.2d 272, 277 (3d Cir. 1972). The Second and Ninth Circuits uniformly apply state limitation periods for statutory causes of action. E.g., *Rosenberg* v. *Martin*, 478 F.2d 520, 526 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973); *Swan* v. *Bd. of Higher Education of the City of New York*, 319 F.2d 56, 60 (1963); *Donovan* v. *Reinbald*, 433 F.2d 738, 741-42 (9th Cir. 1970); *Smith* v. *Cremins*, 308 F.2d 187 (9th Cir. 1962). The Fourth Circuit, in cases arising out of Virginia, applies that State's general limitations period for personal injuries rather than its shorter limitations period for intentional torts. That court reasons that a federal civil rights action is more serious than a common law tort and thus deserves a longer statute of limitations. *Almond* v. *Kent*, 459 F.2d 200, 203-04 (4th Cir. 1972); followed in *Runyon* v. *McCrary*, 427 U.S. 160, 179-82 (1976), and *Allen* v. *Gifford*, 462 F.2d 615 (4th Cir. 1972). There is a split in authority in the Fifth Circuit. Some cases apply state limitations periods for statutory actions. *White* v. *Padgett*, 475 F.2d 79, 85 (5th Cir.), *cert. denied*, 414 U.S. 861 (1973); *Franklin* v. *City of Marks*, 439 F.2d 665 (5th Cir. 1971); *Nevels* v. *Wilson*, 423 F.2d 691 (5th Cir. 1970). Others apply the state statute of limitations that would govern a common law action that could be brought in a state court upon the same facts. *Shaw* v. *McCorkle*, 537 F.2d 1289 (5th Cir. 1976); *Shank* v. *Spurill*, 406 F.2d 756 (5th Cir. 1969); *Beard* v. *Stephens*, 372 F.2d 685 (5th Cir. 1967). The most recent cases in the Sixth Circuit have applied state limitations periods for statutory actions. *Mason* v. *Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975); *Garner* v. *Stephens*, 460 F.2d



We thus hold that the Illinois five-year statute of limitations applies to statutory claims brought under the Civil Rights Acts. *Jones* v. *Jones*, 410 F.2d 365 (7th Cir. 1969), *cert. denied*, 396 U.S. 1013 (1970), is hereby overruled.

Turning to the *Bivens* claims, we recognize plaintiff's argument for application of the same statute of limitations that we apply to civil rights claims is a compelling one. *A contrary result could lead to the incongruous application of inconsistent limitations periods to different members of a single conspiracy, based solely on whether an officer alleged to have committed the constitutional violation was employed by the state or federal government.* Cf. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1346-47 (2d Cir.

[7] (Continued)

1144 (6th Cir. 1972); Contra, *Madison* v. *Wood*, 410 F.2d 564 (6th Cir. 1969); *Bufalino* v. *Michigan Bell Tel. Co.*, 404 F.2d 1023, 1028 (6th Cir. 1968); *Mulligan* v. *Schacter*, 389 F.2d 231 (6th Cir. 1968). In *Reed* v. *Hutto*, 486 F.2d 534 (8th Cir. 1973), the Eighth Circuit recognized the existence of a clear split in the circuit between the two methods of choosing an appropriate statute of limitations. Since *Reed*, the court has avoided the problem of applying state statutes of limitations, other than those for common law torts or for statutory actions, that "clearly apply" to civil rights actions. *Chambers* v. *Omaha Public School District*, 536 F.2d 222, 228 (8th Cir. 1976) (Nebraska statute of limitations applying to "actions upon a liability created by federal statute . . . for which . . . no period of limitations is provided in such statute." *Peterson* v. *Fink*, 515 F.2d 815 (8th Cir. 1975) (Missouri statute of limitations applying to actions against officers for liabilities incurred by official acts). The Tenth Circuit has applied general state statutes of limitations for "injuries to the rights of another not arising from a contract and not otherwise enumerated." *Crosswhite* v. *Brown*, 424 F.2d 495 (10th Cir. 1970); *Wilson* v. *Hinman*, 172 F.2d 914 (10th Cir.), *cert. denied*, 336 U.S. 970 (1949).

1972) (immunity of state and federal officers). *On the other hand, since Bivens actions are not creatures of statute, the state law rationale used above for application of the five-year statute of limitations is not appropriate to Bivens claims.*

With these considerations in mind, we look to the Illinois statutes of limitations that we might apply. Again we are faced with a choice between the two-year limitations periods for torts in Ill. Rev. Stat. ch. 83, § 15, and the five-year limitations period for "actions not otherwise provided for" in Ill. Rev. Stat. ch. 83, § 16. We can eliminate the first choice for the same reasons we refused to apply the Illinois statute of limitations for torts to the state defendant here. Like civil rights claims, *Bivens* claims for the deprivation of constitutional rights cannot be equated with state tort claims. Both the elements of the two types of claims and the underlying rights asserted are distinctly different. *Regan* v. *Sullivan*, 417 F. Supp. 399, 403 (E.D.N.Y. 1976). The Supreme Court recognized these differences in *Bivens* itself:

> "[A]s our cases make clear, the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." 403 U.S. at 392.
>
> "The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against searches and seizures, may be inconsistent or even hostile." 403 U.S. at 394.

The only other applicable statute of limitations is the five-year catch-all period of limitations we applied to the instant civil rights claims. For those claims, we held that the five-year period applied because they were based on a liability created by statute, for which Illinois courts



apply the five-year limitations period. For *Bivens*-type claims, we think it inappropriate to apply the five-year statute of limitations on that basis, but apply that statute because no other Illinois statute of limitations can appropriately be applied. This conclusion is reinforced by the knowledge that an identical statute of limitations period will be applied to all the defendants in this action, thus avoiding the inconsistent result of applying different statutes of limitations to defendants who are charged with engaging in a single conspiracy.

In summary, we hold that this survivors action may be brought by the plaintiff and that her claims are not time-barred. Accordingly, the district court's judgment is reversed and the case is remanded for further proceedings.

## APPENDIX C

28 U.S.C. § 1652:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 2401:

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.
>
> (b) A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2680(h):

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts of omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.



42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1986:

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the

deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. § 1988:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys fee as part of the costs.

Ill. Rev. Stat., ch. 83, § 16:

Except as provided in Section 2-725 of the "Uniform Commercial Code", enacted by the Seventy-second



General Assembly, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

Ill. Rev. Stat., ch. 83, § 15:

Actions for damages for an injury to the person, or for false imprisonment, or malicious prosecution, or for a statutory penalty, or for abduction, or for seduction, or for criminal conversation, shall be commenced within two years next after the cause of action accrued.

Ill. Rev. Stat., ch. 3, § 339:

In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover damages for an injury to real or personal property or for the detention or conversion of personal property, actions against officers for misfeasance, malfeasance, or nonfeasance of themselves or their deputies, actions for fraud or deceit, and actions provided in Section 14 of Article VI of "An Act relating to alcoholic liquors", approved January 31, 1934, as amended.

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 75C 3204) • •

JURISDICTION
Sept. 25, 1975

1. This is a civil action for damages arising from defendants' acts, under color of law, depriving Jeff Beard of rights secured by the Constitution and laws of the United States. Specifically, some or all of the defendants, while acting in their individual and official capacities as either Chicago Policemen or Federal officials, on or about May 17, 1972, assaulted Jeff Beard with a deadly weapon and killed him. By these acts Jeff Beard was deprived of his rights, privileges, and immunities as guaranteed and protected by the Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution.

2. The jurisdiction of the Court is invoked pursuant to 28 U.S.C., section 1331. The amount in controversy, exclusive of interest and costs, exceeds the sum or value of ten thousand dollars.

3. The jurisdiction of the Court, as to defendant Robinson, is further invoked pursuant to 28 U.S.C., section 1343.

PLAINTIFF

4. Plaintiff ELOISE BEARD, the natural and legal sister of the deceased JEFF BEARD, is the duly appointed administratrix of the decedent's estate. Plaintiff is a resident of the State of Illinois and a citizen of the United States.

DEFENDANTS

5. Defendant STANLEY B. ROBINSON, at all times material to this complaint, was a Sergeant of the Chicago Police Department.



6. Defendant WILLIAM O'NEAL, a/k/a WILLIAM McKINLEY, at all times material to this complaint, was a paid agent, employee, informant, and operative of the Federal Bureau of Investigation in Chicago, since 1968.

7. Defendant RAY MARTIN MITCHELL, at all times material to this complaint, was a duly appointed Special Agent in the Federal Bureau of Investigation, assigned to the Chicago office. MITCHELL was the contact agent for defendant O'NEAL, and controlled his activities. Defendant MITCHELL had knowledge of the illegal acts committed on or about May 17, 1972, prior to their occurrence.

8. All defendants are sued in both their individual and official capacities.

9. All defendants are residents and citizens of the County of Cook, State of Illinois, and of the United States with the exception of RAY MARTIN MITCHELL, who on information and belief, resides in Joliet, Illinois, and WILLIAM M. O'NEAL, whose whereabouts are unknown to plaintiff but now remains in the custody and care of the United States Department of Justice.

10. The Federal Bureau of Investigation, at all times material to this complaint, was collecting intelligence information on certain members of the Chicago Police Department, in general, and ROBINSON in particular.

11. These intelligence gathering activities in part, encompassed the covert operations which resulted in the sacrifice of the lives of Jeff Beard and others, in order to expose suspected corruption among members of the Chicago Police force.

12. One of the ploys decided upon by MITCHELL and others whose identities remain unknown was the use of a paid informant, defendant O'NEAL, to provoke and perpetrate acts of violence in order to gather intelligence information on ROBINSON and other members of the Chicago Police Department.

13. In order to better gather the desired information, MITCHELL directed O'NEAL to join in the furtherance of criminal acts being directed by ROBINSON and others. These acts included but were not limited to, exortion and murder.

14. At all times material to this complaint, O'NEAL supplied information to the FBI, through his contact, MITCHELL, about both the conspiracy, and ROBINSON'S participation therein. The information supplied included reports of acts of violence in which defendant O'NEAL, himself, had participated.

15. On or prior to May 17, 1972, defendants ROBINSON, O'NEAL, MITCHELL, and others not presently known to plaintiff, participated in planning the acts which resulted in the murder of Jeff Beard.

16. On or about May 17, 1972, sometime after 10:00 P.M., defendants ROBINSON and O'NEAL accosted and seized Jeff Beard. ROBINSON stated that he had a warrant for Beard's arrest and directed him to go along peacefully. Continuing to act under color of law, defendant ROBINSON searched and handcuffed Jeff Beard and placed him in a car driven by O'NEAL. In fact, no arrest warrant existed.

17. Subsequent to the illegal abduction described in Paragraph 17, O'NEAL, accompanied by ROBINSON, drove Jeff Beard from Chicago to Indiana. Prior to arriving in Indiana, ROBINSON ordered the car stopped, made a telephone call, and then took control of the car for the remainder of the journey.

18. Upon arrival in Indiana, ROBINSON directed Jeff Beard to step out of the car, and then ROBINSON clubbed and shot Jeff Beard to death.

19. The events described in Paragraphs 16-19, were accomplished with the direct participation and assistance of ROBINSON, O'NEAL, MITCHELL, and others presently unknown.



20. The unjustifiable use of excessive and deadly force by these defendants, and the planning and encouragement of same, all performed under color of law, deprived Jeff Beard of his rights, privileges, and immunities as guaranteed and protected by the Constitution and Laws of the United States, and as such amounted to a conspiracy to interfere with Jeff Beard's civil rights.

21. Jeff Beard was deprived of his right to be free from illegal searches and seizures, as guaranteed by the Fourth Amendment to the Constitution of the United States by the defendants' illegal abduction of his person, effected under color of law.

22. Jeff Beard was deprived of his right to life, liberty and property, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, by the illegal and summary punishment, and planning of same, by the defendants.

23. Jeff Beard was deprived of his right to be free from cruel and unusual punishment, as guaranteed by the Eighth Amendment to the Constitution of the United States, by the defendant's brutal, unjustifiable, and summary punishment of plaintiff's decedent, and by the planning and encouragement of same.

24. Defendant Robinson was convicted in the United States District Court for the Northern District of Illinois of depriving Jeff Beard of his right to life, liberty and property without due process of law; that conviction was affirmed by the United States Court of Appeals for the Seventh Circuit in August, 1974.

25. Violation of the commands of the Constitution and specifically, the provisions of the Fourth, Fifth, Eighth, and Ninth Amendments give rise to an implied right of recovery for the illegal activities of federal officials, acting under color of law.

26. The rights guaranteed to Jeff Beard by the Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments are similarly protected against state action by the due process

clause of the Fourteenth Amendment to the Constitution and the provisions of 42 U.S.C., section 1981 *et seq.*, particularly, sections 1983 and 1985.

WHEREFORE, plaintiff ELOISE BEARD, as Administratrix of the Estate of JEFF BEARD, demands judgment against defendants ROBINSON, O'NEAL, MITCHELL, and others not presently known to her, jointly and severally, for compensation for damages in the amount of $250,000.00 and further demands judgment against said defendants, jointly and severally, for punitive damages in the amount of $500,000.00, plus cost of this action, attorney's fees and other such relief as this court deems just, proper, and equitable.

Edwin A. Rothschild
Harold C. Hirshman
Peter M. Weil
Lois Kraft
By_____
One of the Attorneys for
Eloise Beard, as Administratrix
of the Estate of Jeff Beard

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STATE OF ILLINOIS )
) ss
COUNTY OF COOK )

CERTIFICATE OF SERVICE

_____, being first duly sworn on oath deposes and says that she is employed in the Office of the United States Attorney for the Northern District of Illinois; that on the 4th day of February, she will hand a copy of

DEFENDANTS' MOTION TO FILE INSTANTER,
MOTION TO STAY PROCEEDINGS

to one or all of the following named individuals, on said date at the hour of about 10:00 a.m. in open court in the courtroom of the Honorable Hubert L. Will, Room 2341.

Edwin A. Rothschild,
Harold C. Hirshman,
Peter M. Weil, and
Gary S. Gildin, Esqs.
Sonnenschein, Carlin, Nath & Rosenthal
233 South Wacker Drive, Suite 8000
Chicago, Illinois 60606
American Civil Liberties Union
5 South Wabash
Chicago, Illinois 60603

_____

Subscribed and sworn to before me
this _____ day of _____, 1977.

_____

Notary Public

## STATUTES OF LIMITATIONS FOR §1983 ACTIONS

| State | Statute | Period | Authority |
|---|---|---|---|
| Alabama | Code of Ala. Tit. 7, §26 | 1 yr. | Boshell v. Alabama Mental Board 473 F.2d 1369 (5th Cir. 1973) |
| Arkansas | Ark.Stats §§ 37-206 | 3 yr. | Clark v. Mann, 562 F.2d 1104 (8th Cir. 1977) |
| California | Cal. Code of Civil Procedure §338(1) | 3 yr. | Briley v. State of Cal., 564 F.2d 849 (9th Cir. 1977) |
| Connecticut | C.G.S.A. §52-577 | 3 yr. | Williams v. Walsh, 558 F.2d 667 (2d Cir. 1977) |
| Delaware | 10 Del.C. §§8106 | 3 yr. | Gordenstein v. University of Delaware, 381 F.Supp. 718 (D.Del. 1974) |
| Florida | West's F.S.A. § 95.11 | 4 yr. | Powell v. Radkins, 506 F.2d 763 (5th Cir. 1975) |
| Georgia | Code Ga. §3-1004 | 2 yr. | Shrank v. Spruill, 406 F.2d 757 (5th Cir. 1969) |
| Hawaii | Section 657-12, H.R.S. | 6 yr. | Sotomura v. County of Hawaii, 402 F.Supp. 95 (D.Ha.1975) |
| Indiana | Burns Indiana Code Ann §2-602 | 2 yr. | Hill v. Trustees of Ind. Univ. (Konziq, J. concurring specially) 537 F.2d 248 (7th Cir. 1976) |
| Iowa | I.C.A. §614.1, subds.2 | 2 yr. | Johnson v. Daily 479 F.2d (8th Cir. 1973) cert den. 414 U.S. 1009 (19 |
| Kentucky | K.R.S. §413.140(1)(e) | 1 yr. | Carmicle v. Weddle, 555 F.2d 554 (6th Cir. 1977) |
| Louisiana | La. Civil Code Art. 3536 | 1 yr. | Humble v. Foreman, 563 F.2d 780 (5th Cir. 1977) |



| State | Statute | Period | Authority |
|---|---|---|---|
| Maryland | Code Md. 1957 art 31 B, 1 et. seq. | 3 yr. | McDonald v. Boslow, 363 F.Supp. 493 (D. Md. 1973) |
| Massachusetts | Mass. Gen.Laws Ann. ch 260 §2A | 3 yr. | Kadar Corp. v. Milbury, 549 F.2d 230 (1st Cir. 1977) |
| Michigan | M.S.A. §27.605 | 3 yr. | Madison v. Wood, 410 F.2d 564 (6th Cir. 1969) |
| Minnesota | M.S.A. §541.07(1) | 2 yr. | Savage v. United States, 450 F.2d 449 (8th Cir. 1971) cert. den. 405 U.S.1043 rel den 406 U.S.951 |
| Mississippi | Miss. Code Ann. §15-1-49 | 6 yr. | Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976) |
| Missouri | V.A.M.S §516.120(4) | 5 yr. | Duisen v. Terrel, 332 F.Supp. 127 (W.D. Mo.C.D. (1971) |
| Nebraska | Neb. Rev.Stat. §25-219 | 3 yr. | Chambers v. Omaha Public School Dist., 536 F.2d 222 (8th Cir.1976) |
| Nevada | N.R.S. 11.190(3)(a) | 3 yr. | Mason v. Schaub, 546 F.2d 308 (9th Cir. 1977) |
| New Jersey | N.J.S.A. 2A:14-2 | 2 yr. | Hughes v. Smith, 389 F.2d 42 (3d Cir. 1968) |
| New York | N.Y.Civ.Prac Law §214(2) (McKinney Supp. 1975) | 3 yr. | Meyer v. Frank, 550 F.2d 726 (2nd Cir. 1977) |
| North Carolina | 1A General Statutes of North Carolina Ch.1 §1-52(2) | 3 yr. | Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975) |
| Ohio | O.R.C. §2305.11 | 2 yr. | Austin v. Brammer, 555 F.2d 142 (6th Cir. 1977) |
| Oklahoma | 12 Okl.St.Ann. §95 (1961) | 2 yrs. | Crosswhite v. Brown, 425 F.2d 495 (10th Cir. 1970) |

| State | Statute | Period | Authority |
|---|---|---|---|
| Pennsylvania | Pa.Stat.Ann. tit.12.§51<br>" " " " " §34 | 1 yr.<br>2 yr. | Polite v. Diehl, 507 F.2d 119 (3rd Cir. 1974) |
| Tennessee | T.C.A. §28-304 | 1 yr. | Harrison v. Wright, 457 F.2d 793 (6th Cir. 1973) |
| Texas | Tex.Rev.Civ.Stat.Ann. art 5526 | 2 yr. | Snell v. Short, 544 F.2d 1289 (5th Cir. 1976) |
| Virginia | Va. Code §8-24 | 1 yr. | Morrison v. Jones, 551 F.2d 939 (4th Cir. 1977) |
| Washington | R.C.W. 4.16.080(a) | 3 yr. | Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977) |
| Wisconsin | Wisconsin Statutes §893-21(a) | 2 yr. | Margoles v. Ross, 67 F.R.D. 666 (W.D. Wis. 1975) |

No. 77-1203

In the
# Supreme Court of the United States

ROY MARTIN MITCHELL,

*Petitioner,*

*vs.*

ELOISE BEARD, as Administratrix for the Estate of Jeff Beard,

*Respondent.*

## PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## *No. 77-1203*

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# PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

---

## STATEMENT

Pursuant to Rule 24, Rules of the Supreme Court of the United States, this Reply is filed for the express limited purpose of answering respondent's argument, first raised in its answering brief, that petitioner may not pursue the issues which he raises in his Petition.

## INTRODUCTION

Respondent's major contention against Mitchell's Petition for Writ of Certiorari is the inconsistency between

Mitchell's arguments in the Court of Appeals and his arguments here. Beard's Estate neglects to mention, of course, that it argued in the Court of Appeals that federal common law should govern the right of survivorship and that it now takes a position diametrically opposed to that stance.

Beard's Estate further ignores the thrust of Mitchell's argument. If the Court of Appeals was correct in holding that *Bivens*-type claims are analogous to no state cause of action and, of necessity, should not be considered against the background of tort liability, then uniform federal law is required to govern all phases of a *Bivens*-type claim, including the right of survivorship and period of limitations.

Mitchell's Petition, moreover, is not limited to the questions of the adoption of uniform federal rules to be applied to *Bivens*-type claims. Rather, petitioner's argument for the adoption of a uniform statute of limitations (based upon the Federal Torts Claims Act) and a uniform right of survivorship (based upon the 1871 Civil Rights Act) supports the District Court's judgment.

As the prevailing party in the District Court, Mitchell was under no obligation to raise these arguments in support of his judgment, particularly when they would have been rejected by the appellate court.[1] Further, as

[1] As noted by respondent, in *Baker* v. *F&F Investment*, 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970), the Seventh Circuit rejected the adoption of a federal statute of limitations in Civil Rights Act cases. As this Court held in *Youakim* v. *Miller*, 425 U.S. 231, 235 (1975), a petitioner is not required to raise an issue as a separate ground for decision when it would appear that the ground would have been rejected.



the prevailing party, Mitchell may now raise any argument supporting the District Court's judgment.

Beard's Estate also urges that the only facts before the Court are those facts alleged in its Complaint, while, in its brief below, it stated that most of the facts contained in the Complaint are taken from *United States* v. *Robinson*, 503 F.2d 208 (7th Cir. 1974), *cert. denied*, 420 U.S. 949 (1975), thus, in effect, inviting that Court to review the record of *Robinson*.[2]

## THE ISSUES PRESENTED BY MITCHELL'S PETITION ARE PROPERLY BEFORE THE COURT

Beard's Estate contends that, because these questions were not argued by petitioner before the Court of Appeals, Mitchell may not address the issue of whether that Court erred in failing to adopt a uniform federal right of survivorship and statute of limitations to govern *Bivens*-type claims. It is difficult to understand respondent's concern in that it specifically appealed the question of the applicability of federal common law in the *Bivens* context.

Respondent also objects to Mitchell's questions relating to the applicability of Indiana law, again on the ground that the issue was not raised below. The Complaint, however, alleges that Beard was killed in Indiana. Surely, that State's laws regarding survivorship and limitations are properly before this Court in light of the fact that

[2] Eloise Beard, Administratrix for respondent, testified at Robinson's criminal trial as did most of the witnesses who would likely be called to testify if the instant case proceeded to trial. Hence, the facts established by sworn testimony and exhibits in *Robinson* are extremely relevant to the Court's consideration of this Petition.

Beard's Estate could have brought this claim in Indiana. Moreover, it is well settled that the Court may examine any evidence in the record, whether called to the attention of the lower court or not, which is relevant to the correctness of that court's decision. *Marconi Wireless Co.* v. *United States,* 320 U.S. 1, 44 (1942); *Muncie Gear Co.* v. *Outboard Motor Co.,* 315 U.S. 759, 766-8 (1941).

Petitioner concedes that he has not previously urged the adoption of a federal common law and that he has argued that the two-year Illinois statute of limitations would best effectuate the federal policy established by this Court in *Bivens.*[3] He continues to assert the latter issue here. However, he now also offers an argument which the Seventh Circuit has uniformly rejected in the past and which, considering that Court's prior pronouncements, certainly would have been rejected in this case below: namely, the compelling necessity of applying a uniform body of federal common law in *Bivens*-type cases.

In urging its position, Beard's Estate ignores the fact that this Court will consider issues neither raised nor considered by the Court of Appeals where the court below has made errors of a fundamental or jurisdictional character, *see, Gila Valley Ry. Co.* v. *Hall,* 232 U.S. 94, 98 (1913); *Grant Bros.* v. *United States,* 232 U.S. 647, 660 (1913); *Magruder* v. *Drury,* 235 U.S. 106, 113 (1914), or where the case presented for review is an exceptional case, *Duigan* v. *United States,* 274 U.S. 195, 200 (1926);

[3] In so doing, petitioner noted that a *Bivens*-type claim is now covered under the Federal Tort Claims Act and, accordingly, the Illinois period of limitations for a claim analogous to a similar claim brought under the Federal Tort Claims Act should govern this action. *See* Respondent's Supp. App. at 24, 25.



*Youakim* v. *Miller,* 425 U.S. 231 (1975). *See also* Wolfsen & Kurland, *Jurisdiction Of The Supreme Court Of The United States* § 418 (1951).

## I. THE DECISION OF THE SEVENTH CIRCUIT IS BASED UPON FUNDAMENTAL ERROR.

As noted in Mitchell's Petition, the holding of the Court of Appeals overturns 29 years of decisional law in the Seventh Circuit and ignores all relevant decisions of the Court since *O'Sullivan* v. *Felix,* 233 U.S. 318 (1913). If that decision is correct, it marks a fundamental change in established law. If incorrect, the decision is grounded in a fundamental misinterpretation of the law. In either event, review by the Court is appropriate before requiring Roy Martin Mitchell to defend a costly and protracted trial of this matter and the appeals which would surely follow.[4]

The Seventh Circuit's error here is two-fold: first, it necessarily rejects the holding of *Monroe* v. *Pape,* 365 U.S. 167 (1963) that constitutional violations must be considered against the background of tort liability; and second, it fails to establish any sensible ground rules for the new creature it spawned.[5] Accordingly, Mitchell's request for review of that Court's decision is quite proper.

[4] *See Ecker* v. *Western Pacific R. Corp.,* 318 U.S. 448, 489 (1942), where the Court held that, in the interest of judicial economy, it would review an issue fully presented by petition for certiorari, but which was not passed on by the Court of Appeals where a review of that issue was essential to a complete review of the District Court's judgment.

[5] As noted in the Petition, the Circuit looked to an underlying state claim to hold that Beard's Estate's action survived, while, at the same time, it looked to Illinois' "catch-all" statute of limitations because it held that a *Bivens* claim is analgous to no state cause of action.

## II. THE CIRCUMSTANCES OF THIS CASE JUSTIFY ITS TREATMENT AS AN EXCEPTIONAL CASE.

The Court has long held that it will review questions not raised or argued below in exceptional cases. Thus, in *Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 411 (1946), the employer petitioners were allowed to object to a jury instruction even though they had not timely objected to the charge. Likewise, in *Terminiello* v. *Chicago,* 337 U.S. 1, 9 (1947) (Frankfurter, J. dissenting), the Court overturned a conviction for breach of peace on a ground not raised by petitioner in the Illinois courts, not made the basis of the petition for certiorari, and expressly disavowed by petitioner before the Court. And, in *Blonder-Tongue* v. *University Foundation,* 402 U.S. 313 (1970), the Court overruled *Triplett* v. *Lowell,* 297 U.S. 638 (1936), despite the fact that both parties argued for its retention and agreed that it was the applicable law.

In *Youakim* v. *Miller, supra* at 234, 235, four criteria were defined to determine whether a case will be treated as exceptional. The instant case meets all four in that (1) the issues of the application of a uniform federal right of survivorship and statute of limitations are not foreign to the subject matter of the Complaint; (2) those issues could have been pursued under the pleadings filed in the case; (3) if petitioner relied on them as separate grounds for decision, those grounds would have been rejected by the Circuit; and (4) since the case was argued before the Court of Appeals, the Fifth Circuit, in *Shaw* v. *Garrison,* 545 F.2d 980 (5th Cir. 1977), has determined that there is a federal common law right of survivorship and this Court has granted certiorari to



decide that issue, *Robertson* v. *Wegmann,* No. 77-178 (Dec. 5, 1977).

Perhaps the most famous instance of the Court's application of the "exceptional case" rule is *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1937), where *Swift* v. *Tyson,* 16 Pet. 1 (1842) was overruled, even though the litigants limited their arguments to whether, under the *Swift* doctrine, Pennsylvania or federal tort law was applicable and whether the evidence showed that plaintiff was guilty of contributory negligence. 304 U.S. at 82 (Butler, J. dissenting).

The procedural posture of *Erie* is nearly identical to the procedural posture of the instant case. In *Erie,* the parties agreed that *Swift* was applicable. Nevertheless, the Court took it upon itself to summarily overrule *Swift* because that case did not serve the purpose for which it was intended. Rather than creating, as intended, a uniform law which would insure that non-citizens in a diversity case would receive equal protection of the law, *Swift* actually introduced grave discrimination by non-citizens against citizens in that it granted the non-citizens the privilege of selecting whether his case would be decided under state law or under the unwritten "general law". The Court would not tolerate such an inequitable state of affairs.

Likewise, the parties here have contended that, under established law, the forum state's statute of limitations should control a *Bivens*-type claim. However, as is readily apparent from this case, a continued acceptance of this proposition will place federal agents in the very same position that citizen defendants occupied prior to *Erie.*

Unless this Court announces a uniform federal right of survivorship and statute of limitations to govern *Bivens*-type claims, federal defendants will be consigned to the same far-reaching and unreasonable discrimination struck down in *Erie*. The fact that Roy Mitchell rather than the Court itself first noticed and raised this issue should not prevent its consideration.

## CONCLUSION

Beard's Estate sets forth excerpts of the Seventh Circuit's opinion in *United States* v. *Robinson, supra,* as recognizing the possibility of this lawsuit. That opinion, which was delivered on August 19, 1974, does indeed raise the possibility of a *Bivens*-type claim. What respondent fails to explain, however, is why it delayed until September 25, 1975—more than three years after Beard's death and more than one year after the Seventh Circuit raised the possibility of a claim—to file the instant Complaint.

Whether or not Beard's Estate possibly may have had an actionable claim against Mitchell and the others who worked to bring Beard's murderer before the bar of justice, the unwarranted delay in bringing this action renders it "an unfortunate event in history which has no present legal consequences". *United Airlines* v. *Evans,* 431 U.S. 553 (1977).

For any and all of the reasons set forth in Mitchell's Petition for Writ of Certiorari and in this brief, Petitioner respectfully requests the Court to grant his Petition.



Respectfully submitted,

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